

VC / PE IN AUSTRIA

LEGAL AND TAX ASPECTS

compiled by



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for AUSTRIAN BUSINESS AGENCY

January 2018

Why Austria?

Success factors for Austria as a startup location

International companies and investors have become aware of the booming startup scene in Austria. Twitter purchased the startup app “Fastlane” – the fitness app “Runtastic” and the flea market platform “Shpock” were sold to Adidas and Schibsted.

In particular, the business location Vienna has emerged as a Central European hub which is very attractive to innovative founders from Austria and abroad.

- Optimal funding system implemented by the Austrian Research Promotion Agency (FFG) and Austria Wirtschaftsservice GmbH (aws) and others
- Extremely active business angel scene, exemplary crowdfunding law
- Supporting network of early-stage investors, incubators and accelerators
- Active event scene with Pioneers Festival as anchor point
- Government package of startup-measures and initiatives to benefit founders
- Attractive tax system, the “public limited company with a privileged amount of share capital“, research premium
- Very high educational level in the technical field, excellent universities
- Highest quality of life at affordable costs, international community
- Vienna as the second-largest German-speaking city
- Leading East-West business interface

What can ABA-Invest in Austria do for startups?

Personal support for founders

We have experienced consultants who have been with us for a long time, and who are experts in all aspects of company founding. We offer you personal support, and we provide you with all the contacts you need in Austria. » startup@aba.gv.at

•Extensive information pool

We provide all the current data on Austria as a business location. We also provide information on industries, technologies and market developments, as well as on political and economic conditions.

•Expert consulting

We advise you on the best choice for your first company location. We answer your questions regarding work and taxes; we provide information on the ideal source of funding for you, about co-working spaces, incubators and accelerators; and we help solve problems with the foundation of your startup company.

•Strong support

We help with the processing of formalities. We work together with you in researching funding sources, and support you in working with the respective investment promotion agencies at regional level.

•Sustainable service

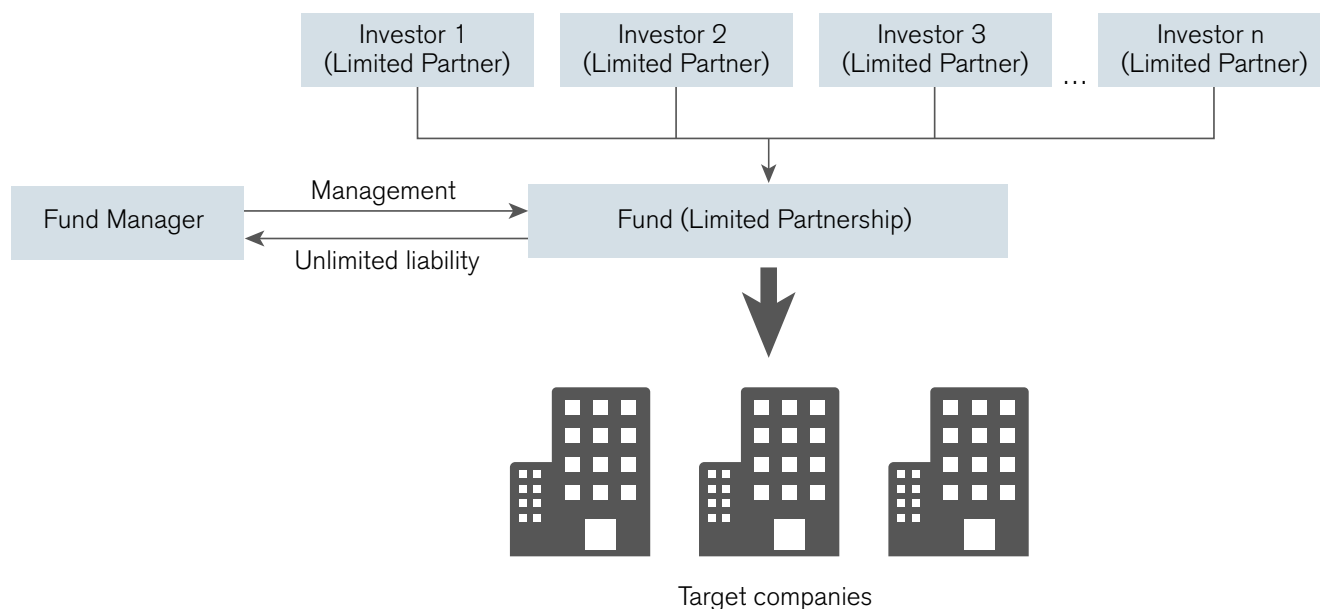
We offer advice and support in the long term. After your project has been implemented, we continue to be available to you as a service center for further investment and development steps.

Legal Structure of Private Equity & Venture Capital funds in Austria

Private Equity funds are usually **Limited Partnerships** (Kommanditgesellschaften).

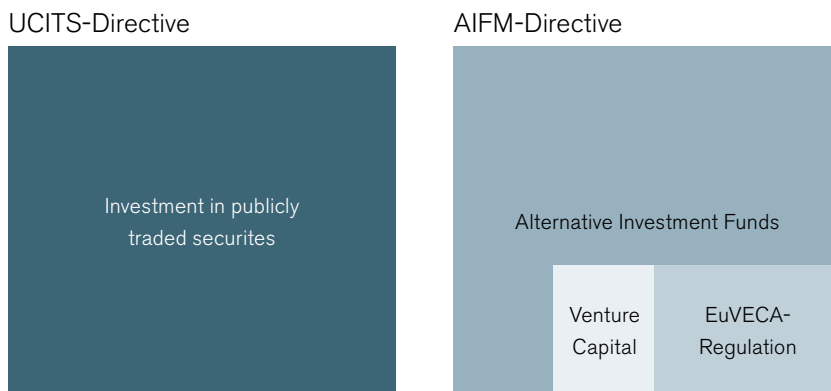
- › The investors are **Limited Partners** (Kommanditisten), meaning that their liability is limited to the amount of their commitment to the fund. The investors do not participate in the management.
- › The **Private Equity firm** (usually an Austrian limited liability company) operates as **General Partner** (Komplementär) of the fund. It thus has unlimited liability. The Private Equity firm manages the fund and represents it in its capacity as shareholder of the target companies (e.g. exercising shareholder rights).
- » The management of the fund receives a **management fee** (approx. 1-3% p.a. of designated funds) and a **carried interest** (i.e. a participation in the proceeds of the funds after the initial investments have been repaid to the investors).

Typical structure of PE and VC funds in Austria



Regulatory Framework – EU

- » Under EU law, there are two major types of investment funds:
 - › ”Undertakings for collective investment in transferable securities”, which are regulated under the **UCITS-Directive** (2009/65/EC). UCITS are funds that invest mainly publicly traded securities.
 - › Alternative Investment Funds (AIF), whose managers are regulated by the **AIFM-Directive** (2011/61/EU). All investment funds that don't fall under the UCITS-Directive are AIF (apart from certain special funds).
- » PE and VC funds are usually **Alternative Investment Funds**. Only the AIFM-Directive, but not the UCITS-Directive is applicable.
- » The **EuVECA-Regulation** (345/2013) applies only to certain Venture Capital Funds. It provides for less stringent requirements than the AIFM-Directive in order to facilitate investments in startups. To our knowledge, all renowned Austrian Venture Capital Funds are currently registered under the EuVECA-regime.



Legal requirements under the AIFM-Directive

- » The AIFM-Directive **only regulates the managers of AIF** (AIFM), since the fund itself is only a vehicle used for pooling the raised money. AIFM that manage assets not exceeding EUR 100/500 million are widely exempted from the scope of the AIFM-Directive.
- » **License requirements.** Every Private Equity Fund Manager must obtain a license issued by the Financial Market Authority of its home Member State (FMA, BaFin...). This license enables the AIFM to operate throughout the whole EU (**passporting system**). AIFM managing assets not exceeding EUR 100/500 million must only be registered.
- » **Initial capital requirements.** Licensed AIFM need to have at least EUR 125,000 initial capital.
- » **Reliability** of the AIFM's directors and major shareholders.
- » **Reporting obligations** towards the Financial Market Authority.

The EuVECA-Regulation is an **opt-in system**: Certain AIFM can opt to be regulated under the regulatory regime of the EuVECA-Regulation instead of the AIFM-Directive (which includes EU-wide fund raising opportunities).

- » The EuVECA-Regulation also requires AIFM to obtain a **registration**, which is **valid throughout the whole EU**. The AIFM can use the designation “EuVECA” as a “**seal of approval**”, which enhances trust of potential investors.
- » The EuVECA-regime does not replace the registration/licensing pursuant to the local regulations transforming the AIFM-Directive into national law.

70% of all capital contributions of an EuVECA-fund have to be invested in so-called “**qualifying investments**”; only 30% may be invested in other assets.

Qualifying investments are **equity or equity-like investments (Mezzanine)** in a company that fulfill the following requirements at the time of the investment:

- » It is **not publicly listed**
- » It employs **fewer than 250 persons**
- » Its annual **turnover** doesn't exceed **EUR 50 million** OR the annual **balance sheet total** doesn't exceed **EUR 43 million**.
- » It's no credit institution, investment firm, holding company or insurance company

The EuVECA-Regulation will be **amended** in the near future. The new version will probably include **minimum capital requirements** (EUR 50,000) and **enhance the scope of eligible “qualifying investments”**:

- » The threshold of 250 employees will be replaced with 499 employees
- » The threshold regarding turnover and balance sheet total will be replaced with a threshold of maximum 200 million market cap.

Recently registered Austrian EuVECA-funds with our assistance

› **Company setup**: The fund is structured as a GmbH & Co KG under Austrian law. The Kommanditgesellschaft (Limited Partnership) serves as vehicle for the investors' contributions, the GmbH (Limited Liability Company) as fund manager.

› **Registration with the Financial Markets Authority**: This involves some paperwork, including:

- » Corporate documents (AoA, Management Contract)
- » Background information on the directors (CV, criminal records)
- » Investment policies
- » Information pursuant to Articles 13 and 14 EuVECA-Regulation
- » Information on the Compliance Officer and his responsibilities
- » Anti-money laundering strategies

Taxation of a typical private equity fund

As already described before, the fund (AIF) would be usually structured as a partnership (GmbH & Co KG), in which a limited liability company acts as the management company and partner with unlimited liability. The other partner (at least one) is only liable according to the agreed contributions to the partnership (GmbH & Co KG)

The management company will be treated as an Alternative Investment Fund Manager (AIFM) as defined by the Austrian AIFMG. This regulatory classification of the fund manager by the Austrian Financial Market Authority has a direct impact on the taxation of the company as an Alternative Investment Fund (AIF).

An Austrian AIF is - according to § 186 Abs 1 Z 2 InvFG 2011 - subject to special tax regulations regarding investment funds with admission in Austria. For instance, gains from an investment fund as defined by InvFG 2011 are not assigned to the fund itself, but to the shareholders and investors of the management company (= transparency principle). Taxation will also follow this principle, therefore gains from the fund will be directly and exclusively taxed at the level of the shareholders. Gains will be treated as if the investor is holding the assets (mostly shares in domestic and international corporations) assigned to the fund directly in his or her own account.

The investment Fund Act deviates from the Austrian income tax law, which assumes that earnings by a coownership collective (e.g. a partnership as the GmbH & Co KG) is also income to the co-owner (shifting of tax periods).

As a first step, earnings will be accumulated in the fund. They will only be assigned to shareholders in case they are actually distributed or when a “fictional distribution of earnings” takes place.

In this case the fund’s earnings are treated as if they were actually distributed and therefore as taxable income to the shareholders. The effective date stipulated by the law is currently 4 months from the end of the fiscal year. However, only 60% of the non-distributed capital gains have to be taxed by individual investors. The tax paid on the non-distributed earnings can be credited for actual distributions of these earnings in the future.

The main benefits of a fund (AIF) structured like this - especially when compared to direct investments by an individual investor - are **tax-deductible expenses and tax loss carried forward within the fund**.

Within the fund a tax-deductible loss compensation (regarding administrative costs and capital losses that overtake capital gains) as well as a tax loss carried forward are allowed.

This is of particular importance since venture capital investments require a higher number of investments in their portfolio, but only a fraction is expected to perform well.

Due to applying the investment fund taxation (InvFG 2011 as amended by AIFMG) the management company has to report distributions as well as distributions of similar earnings to the tax authorities in its annual reports. Each shareholder has to report his or her earnings in relation with his or her investment in the management company as part of his or her annual income tax return.

For individuals and commercial investors (also individuals) who are fully subject to income tax in Austria, the special tax rate of 27,5% according to § 27a of the Austrian Income Tax Act (EStG) is applicable for the earnings of the investment fund.

Foreign investors (i.e. not being fully subject to income tax in Austria) have to inform themselves about taxation consequences for their individual situation according to their local tax regulations.

No value added tax will be charged on top of the management fee since the management company (GmbH) provides services, in its role as the executive general partner, to the limited partnership (GmbH & Co KG), resulting in a service coalition, which is not taxable from a VAT point of view. On the other hand, the management company is not allowed to deduct input VAT.

Global Incubator Network

Global Incubator Network (GIN) is Austria's one stop shop for investors, startups and incubators. It connects the Austrian startup ecosystem with international partners interested in the Austrian and European markets respectively. Based on international cooperation agreements, it has a special focus on hotspots in Asia (Hong Kong, Singapore, Japan, South Korea as well as Israel).

What makes GIN so special? GIN is a single point of contact and offers customized services for investors, VC-Funds, other international partners as well as a variety of programs for startups. For example, GIN brings international startups to Austria for its goAustria program twice a year and sends, together with its partners, Austrian startups for the various goAsia programs to all the flourishing startup-hubs in Asia. There, international investors can easily get in touch with these handpicked, innovative startups and have access to even more investment targets and cooperations in Austria with GIN as a proficient partner.

Got interested? Visit our website www.gin-austria.com and get in touch with us!

GIN is a flagship program initiated by the Austrian government and is managed by the public agencies aws and FFG.

aws Founders Fund

aws Founders Fund is Austria's leading and most active Venture Capital fund and has EUR 68.5 m under management. The fund invests during the later seed and series A/B phases of highly scalable Austrian technology startups. As a lead or co-investor the fund invests up to EUR 3 m in equity and mezzanine capital or various flexible contract structures.

As a long-term partner, aws Founders Fund offers both startup and follow-up financing. The fund supports future (financial) plans as a long-term investor and partner and believes in the additional value of co-investments. In order to ensure optimal development of their business, their partners are granted excellent access to an international investors and corporates network, as well as their market expertise and the numerous support opportunities provided by aws.

aws Founders Fund collaborates closely with the management team to enhance the strategic and operative performance of the portfolio companies, without interfering with day-to-day operations.

The objective of aws Founders Fund is to establish a partnership among equals with portfolio companies and to offer a supportive role in establishing a market position as well as achieving and maintaining sustainable growth.

aws Mittelstandsfonds

aws Mittelstandsfonds is an entrepreneurial growth equity fund based in Vienna with EUR 80 m under management. It pursues growth investments in innovative Austrian small and medium sized enterprises. Other potential investment situations are MBOs, MBIs, takeovers, corporate spin-offs or succession plans.

As a 100 % subsidiary of Austria Wirtschaftsservice (aws) the fund aims to improve the accessibility of investment capital for Austrian SMEs, to create and strengthen partnerships and hence generate sustainable growth of the portfolio companies.

aws Mittelstandsfonds is focused on active management and sustainable increase in value of its portfolio. As a long-term investor the fund acts as a sparring partner for the management team of the portfolio company without interfering with its day-to-day operations.

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